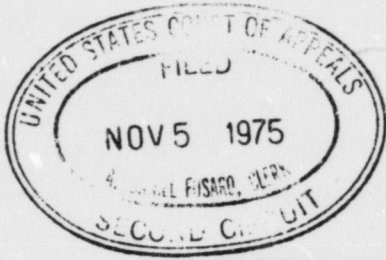


***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**



ORIGINAL

75-7504

B
P/S

United States Court of Appeals
For the Second Circuit

Docket No. 75-7504

LLOYD SHELDON, VICTOR SOTO, JAMES CLIFFORD,
ARTHUR SOHNEN and JOHN HAYES, each of them individu-
ally and on behalf of all other members of INTERNATIONAL
ORGANIZATION OF MASTERS, MATES AND PILOTS,
AFL-CIO, similarly situated,

Plaintiffs-Appellees,

against

THOMAS F. O'CALLAGHAN, as President, or CHARLES M.
CROOKS, as Secretary-Treasurer, or WILLIAM M. CALD-
WELL, as Vice President, of INTERNATIONAL ORGANIZA-
TION OF MASTERS, MATES AND PILOTS, AFL-CIO,

Defendant-Appellant.

APPELLANT'S BRIEF

MARVIN SCHWARTZ

Attorney for Defendant-Appellant

243 Waverly Place

New York, N. Y. 10014

TABLE OF CONTENTS

Preliminary Statement	1
Issues Presented	2
Statement of the Case	4
Summary of Proceedings	4
Statement of Relevant Facts	6
A. The Dissemination of Opposition Views	6
B. The Events Since 1970	15
Point I. The Views of the Opponents to the New Constitution were disseminated sufficiently so as to Satisfy the Requirements of the Labor-Management Reporting and Disclosure Act, as described by the prior mandate of this Court	20
Point II. Even if the LMRDA Requirements Surrounding the referendum were not complied with, the Events which have taken Place since 1970 Constitute a proper ratification of the New Constitution, <u>nunc</u> <u>pro</u> <u>tunc</u>	30
Conclusion	33

TABLE OF CASES

	<u>Pages</u>
<u>Sheldon v. O'Callaghan</u> , 497 F.2d 1276 (2d Cir. 1974), <u>cert. denied</u> , 419 U.S. 1090 (1974)	1,3,5,20,21,28
<u>Gurton v. Arons</u> , 339 F.2d at 374	20

TABLE OF AUTHORITIES

Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §401, et. seq.	
Section 101(a)(1), 29 U.S.C. §411(a)(1)	2,3,5,22,23 28, 29, 30

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
LLOYD SHELDON, VICTOR SOTO, JAMES
CLIFFORD, ARTHUR SOHNEN AND JOHN
HAYES, each of them individually
and on behalf of all other members
of INTERNATIONAL ORGANIZATION OF
MASTERS, MATES AND PILOTS, AFL-CIO,
similarly situated,

Plaintiffs-Appellees,
-against-

Docket No. 75-7504

THOMAS F. O'CALLAGHAN, as President,
or CHARLES M. CROOKS, as Secretary-
Treasurer, or WILLIAM M. CALDWELL,
as Vice President, of INTERNATIONAL
ORGANIZATION OF MASTERS, MATES AND
PILOTS, AFL-CIO,

Defendant-Appellant.

-----X
APPELLANT'S BRIEF

PRELIMINARY STATEMENT

This is an appeal from an unreported judgment in favor of the plaintiffs by the Honorable Whitman Knapp, upon remand from the United States Court of Appeals for the Second Circuit. The prior decision of this Court, reversing Judge Knapp's earlier decision, and remanding the case to him for further proceedings, is officially reported as Sheldon v. O'Callaghan

497 F. 2d 1276 (2d Cir. 1974), cert. denied, 419 U.S. 1090 (1974)

ISSUES PRESENTED

This is an action seeking to set aside a union Constitution approved by membership referendum in a ninety day period between March and June 1970. The trial of the case was held on January 8th and 9th, 1973, before the Honorable Whitman Knapp, U.S.D.J., sitting without a jury. Following presentation of the plaintiffs' case, and on motion of the defendant, Judge Knapp dismissed the action.

On appeal to this Honorable Court, the Judgment was reversed, and the case was remanded to Judge Knapp for further proceedings, with the following mandate from this Court:

"We conclude that, on the evidence as it stood at the time defendants' motion to dismiss was granted, the LMRDA, interpreted in the light of established legal principles, required defendants to make the list of members of the union available to a mailing service chosen by defendants so that plaintiffs could send a letter to all members expressing their views and the view of their local on the issues involved in the referendum. [Footnote omitted]

Defendants state, however, that if their motion to dismiss had not been granted, they would have presented evidence that a newspaper published by plaintiffs' local union was widely distributed among the union membership, and that plaintiffs' views were in fact being disseminated.

The judgment must be reversed, and the case remanded for further proceedings consistent with this opinion."
497 F.2d at p. 1282, 1283

The trial continued on July 2, 1975, with the presentation of the defendant's case. At the conclusion of the case, Judge Knapp, from the bench, ruled that the specifications in the Court of Appeals' mandate had been met by the defendant, and he dismissed the plaintiffs' action. (J.A. 116a, 117a)* On July 28, 1975, Judge Knapp reversed his ruling, and awarded judgment in favor of the plaintiffs. (J.A. 118a, 119a)

The issues presented by this appeal are:

1. In the Union referendum on the adoption of the new Constitution, were the views of the opponents to the new Constitution disseminated sufficiently so as to satisfy the requirements of the Labor Management Reporting and Disclosure Act, as described by the mandate of the Court of Appeals?

2. Even in the event such requirements were not met, did not the passage of some five years during which the Union has conducted its affairs under the new Constitution, and in which time a complete restructuring of the Union has taken place, and during which time three separate, unchallenged

* "J.A." refers to the Joint Appendix; "Tr." refers to the typewritten trial transcript; "Exh." refers to Exhibits introduced into evidence at trial.

membership referenda amending the 1970 Constitution have taken place, constitute a proper ratification of the 1970 Constitution nunc pro tunc?

STATEMENT OF THE CASE

SUMMARY OF PROCEEDINGS

This is a suit brought by five members of the International Organization of Masters, Mates and Pilots seeking to set aside the Union's new Constitution which was approved by a membership referendum held in a ninety day period between March and June 1970.

The plaintiffs alleged a number of irregularities attendant upon the referendum proceedings. A primary complaint was that it was improper for the entire new Constitution to be sent out to the membership on a "yes" or "no" basis, rather than submitting to the membership, for some sort of seriatim vote, a series of amendments by which the old Constitution was to be changed. Among the other complaints was one challenging the fairness of the balloting and vote-counting procedures.

The trial of the action took place on January 8 and 9, 1970, before the Honorable Whitman Knapp, United States District Judge, sitting without a jury. Following the presentation of the plaintiffs' case, and on motion of the defendant, Judge Knapp dismissed the action.

The plaintiffs appealed from Judge Knapp's ruling on a number of grounds. The Court of Appeals reversed the decision of the District Judge, but on only one single ground. This involved the question of the ability of the opponents to the new Constitution to disseminate their views to the membership.

The Court of Appeals remanded the case back to the District Judge on this sole issue, with the following mandate:

"We conclude that, on the evidence as it stood at the time defendants' motion to dismiss was granted, the LMRDA, interpreted in the light of established legal principles, required defendants to make the list of members of the union available to a mailing service chosen by defendants so that plaintiffs could send a letter to all members expressing their views and the view of their local on the issues involved in the referendum. [Footnote omitted]

Defendants state, however, that if their motion to dismiss had not been granted, they would have presented evidence that a newspaper published by plaintiffs' local union was widely distributed among the union membership, and that plaintiffs' views were in fact being disseminated.

The judgment must be reversed, and the case remanded for further proceedings consistent with this opinion."

497 F.2d at p. 1282, 1283

The defendant filed a Petition for a Writ of Certiorari on the Court of Appeals' reversal of Judge Knapp's dismissal of the case. The plaintiffs filed a Cross-Petition, claiming that

the Court of Appeals erred in not finding additionally that it was improper to submit the Constitution on a "yes" or "no" basis. Both Petitions were denied by the United States Supreme Court.

On July 2, 1975, the trial continued before Judge Knapp, with the presentation of the defendant's case. At its conclusion, Judge Knapp, from the bench, ruled that the specifications in the Court of Appeals' mandate had been met by the defendant, and he dismissed the action. (J.A. 116a, 117a) On July 28, 1975, Judge Knapp reversed his ruling, and awarded judgment in favor of the plaintiffs. (J.A. 118a, 119a)

STATEMENT OF RELEVANT FACTS

A. The Dissemination of Opposition Views

The Local 88 Newspaper of
January-February 1970

At the resumption of the trial, testimony with respect to the publication and distribution of the newspaper published by the plaintiffs' local union, one element in the Court of Appeals' mandate, was presented by the defendant through the testimony of Captain Joseph D. Gaier, who was, at the time of the referendum, the President of the plaintiffs' local.

(J.A. 39a)

Captain Gaier at the time of the referendum, was also opposed to the new Constitution (J.A. 40a) as was the entire administration of plaintiffs' local. (J.A. 40a, 47a)

All five delegates who represented the plaintiffs' local, Local 88, had, in fact, voted to reject the new Constitution when it was proposed at the Union's Convention. (J.A. 40a, 150a) Among such dissenting delegates was Lloyd Sheldon, one of the plaintiffs in this action. (J.A. 40a, 41a, 150a)

Local 88, the Union's New York local, published its own newspaper. (Deft's Exh. E, J.A. 150a) At the time of the 1970 referendum, there were approximately 2,300 members in Local 88. The entire Union had a total membership of some 9,500 to 9,800. (J.A. 41a) The January-February 1970 issue of the Local 88 newspaper contained numerous articles highly critical of the proposed new Constitution. (Deft's Exh. E, J.A. 150 a-158a) Prominently featured also were two pictures showing Captain Gaier and other officials of the Union, along with the plaintiff, Lloyd Sheldon, with captions stressing their objection to the proposed new Constitution. (J.A. 150a, 158a) One of the articles against the proposed Constitution bore plaintiff Sheldon's by-line (J.A. 154a)

Fourteen thousand copies of this issue were printed, far in excess of the Local 88 membership and in excess of

the entire MM&P membership. Captain Gaier testified that all members of Local 88 were mailed a copy of this newspaper to their home address, and five copies of the newspaper were mailed to each vessel under contract with the Union. (J.A. 41a, 42a)

The number of copies sent to each ship reflected the number of union members serving aboard the vessel. (J.A. 43a, 44a)

The members serving on the vessels to which the newspapers were sent were members from not only Local 88 but from other locals of the Union as well. (J.A. 44a)

Additional mailings of the newspaper were made. Bulk mailings were sent to each of the Union's locals, and bulk mailings were also sent to United Seamen's Service Clubs throughout the world. (J.A. 45a) In addition, direct mailings were sent to all Union members, not limited to the Local 88 membership, who had shipped or cleared through the Port of New York. That is, any union member who registered on the New York Shipping List would be required to fill out a personnel card containing his address. These members would be sent copies of the Local 88 paper. (J.A. 46a)

In addition to the President, Secretary-Treasurer, and Vice President of Local 88, the local also had officials known as patrolmen. The duties of the patrolmen consisted of boarding each vessel that entered the Port of New York, and in part,

meeting with union members and apprising them of union affairs. All of the Local 88 patrolmen were opposed to the proposed new Constitution. (J.A. 47a, 48a) Two such patrolmen, Ernest Hendry and James White, had by-lined articles in the January-February 1970 issue of the Local 88 Bulletin, opposing the proposed new Constitution. (Deft's Exh. E, J.A. 155a-157a)

Prominent in the objections to the new Constitution as described in the Local 88 newspaper, was a perceived undue concentration of power in the three International Officials, and an objection to the increase in membership dues to \$300 a year commencing in October of 1970.

The page 1 article made the following observations:

" . In the makeup of the General Executive Board where at present voting is by per capita, the voting power would be given to the 3 International officials. Under the present Constitution, these 3 have no vote with the exception of the International President who can vote to break the tie if one exists.

. Under the new set-up membership dues would be increased to \$300 per year starting in October, 1970.

The \$300 per year was an arbitrary figure approved by the delegates without any cost projection whatsoever.

. Under the present Constitution, the per capita tax is voted on by the local executive officers.

Under the new structure, the three international officials would have

50 per cent of the per capita vote.
This would leave no voice for the
majority of the membership in the
Offshore Division."* (J.A. 151a)

Plaintiff Sheldon's by-lined article contained more
pungent observations:

"Consolidation of membership
power is one thing - consolidation
of the power of a handful of officials,
or one official - is something else.
One does not necessarily equate with
the other.

The restructuring change before
this Convention will dilute the ability
of the membership to exercise full and
final authority over the Union. Where
the highest level legislative, executive,
judicial, and administrative bodies of
any Union are not directly accountable
to the membership for their actions,
that membership must eventually lose
control."

(J.A. 154a)

The article of Patrolman Hendry was equally clear in
spelling out the "evils" perceived in the new Constitution.

"The votes of the Int'l Executive
Committee were allotted. pro rata, to
the Executive Officers of each Local.
Under the proposed Constitution, the
International Officials will have at
least 50% of the votes in any General
Executive Board Meeting. From zero to
fifty percent is quite an increase in
power - in an organization such as ours

*This alleged improper concentration of power has, in any event,
been eliminated by a subsequent amendment to the International
Constitution. Under such amendment the members of the General
Executive Board have only one vote each. (Deft's Exh. J)

it is tantamount to dictatorial control.

. . . .

Your quarterly dues will also be increased upon adoption of this Constitution. The minimum Off-shore dues will be \$300 in October 1970. Who knows what the minimum dues will be in 1972 or what the job opportunities will be in 1972 or next year for that matter. ... (J.A. 157a)*

The Local 88 Newspaper
of March-April, 1970

Captain Gaier further testified that the next issue of the Local 88 newspaper, for March-April, 1970 received the same distribution as did the preceding issue. (Tr. 21) In this issue, Patrolman Jim White reported at the February 25, 1970 Local 88 membership meeting that he was taking an active role in campaigning against consolidation (Deft's Exh. F, J.A. 159a) and Patrolman Hendry reported that he finds little support on the vessels for the consolidation as proposed. (J.A. 159a)

Further actions of Local 88 as reflected in the minutes of the February 11, 1970 meeting published in the Local 88 newspaper, revealed Local 88 sentiments strongly opposed to the

*This further objection to the increase in membership dues to \$300 has also been rendered nugatory by the passage of time. In 1975, the Offshore Division membership by referendum voted to further increase the dues beyond the \$300 per year by an additional sum of 6% of earned vacation. (J.A. 51a, Deft's Exh. K)

new Constitution. (Deft's Exh. F, J.A. 161a)

The Local 90 Newspaper
The "Sextant"

The Union's Pacific Coast local at the time of the referendum was Local 90. It had its headquarters in San Francisco, and branch offices and shipping halls in Seattle, Washington, Portland, Oregon and Wilmington, California.

(J.A. 66a)

Local 90 also published its own newspaper, The Sextant. At the time of the referendum, there were approximately 2,000 members of this local (J.A. 59a) Captain George Tuttle, First Vice President of Local 90 at the time of the referendum, gave testimony with respect to the Local 90 newspaper. He was instrumental in its publication during the period involved.

(J.A. 67a-70a)

The press run of the newspaper during this period of time was 3,000 copies per issue. (J.A. 83a)

Each issue of The Sextant was mailed to the current address of all active members of Local 90. (J.A. 71a) In addition, it was mailed to the Offshore, Pilot and Inland Locals, and five copies were mailed to each vessel under contract to Local 90. (J.A. 71a, 72a) Copies were placed on tables in the various Union Halls on the West Coast, and bundled copies were sent to the United Seamen's Service

Clubs overseas. (J.A. 72a) In addition, the Local 90 patrolmen or branch representatives distributed the newspapers to the officers on each of the vessels which paid off on the West Coast. (J.A. 72a, 73a)

The referendum took place at the height of the hostilities in Indochina, when a great many vessels were under charter to the Military Sealift Command carrying ammunition to the Far East. The ships paying off on the West Coast were those not only based on the West Coast, but also vessels under contract to the Atlantic and Gulf Steamship companies. The officers employed on these vessels were not limited to Local 90 members - they came from locals all over the United States. (J.A. 73a, 74a)

Local 90 had a rank and file Constitutional or consolidation committee which was 100% against the proposed new Constitution. (J.A. 79a, 80a)

In the Membership Comments section of the Local 90 newspaper, spirited and salty comments in opposition to the new Constitution were the order of the day. (J.A. 167a-176a) In the February-March 1970 issue, in particular, detailed membership comments, setting forth the salient provisions of the new Constitution and the writers' strident views against adoption were printed. (Deft's Exh. O, J.A. 170a, 174a)

One of the letters published in this February-March

1970 issue of The Sextant was the verbatim letter written by plaintiff Lloyd Sheldon to the International Officers which Sheldon demanded be published in the Union's official newspaper. (J.A. 172a, identical in text to Pltffs' Exh. 7, J.A. 142a, 143a)

The letter, as it appeared in The Sextant, bore the name of Harold H. Sahlin, with franks by four other members of Local 90. It was attributed as follows:

"(The article above was written by a rank and file East Coast delegate to the New Orleans Constitutional Convention)" (J.A. 172a)

Captain Tuttle explained that it was a Local 90 requirement that letters be published only over the names of Local 90 members, and that each letter had to have a member's name for every 250 words. (Tr. 75)

With respect to this Local 90 procedure and Captain Sheldon's letter, Captain Tuttle testified as follows:

"Mr. Sahlin as Chairman of this Committee wished this to be printed in the paper over Captain Sheldon's name. He was told at the membership meeting in assembly that we could not publish any letters from members of the locals, that if he wished to take that letter and put his signature on it and have the correct number of franks, we would be happy to publish it." (Tr. 75)

The Local 47 Disaffiliation

Views in opposition to the new Constitution were also held by the members of Inland Local 47, which was the largest of the Inland Locals, consisting of about 600 members. (Tr. 22, Deft's Exh. D)

Not only did the Local 47 delegates to the Constitutional Convention vote against the new Constitution, but the membership of Local 47 voted to disaffiliate from the International Organization of Masters, Mates and Pilots if the new Constitution passed. The disaffiliation resolution which was passed by the Local 47 membership in convention on March 6, 1970 (Deft's Exh. G, J.A. 162a-166a) spelled out their opposition to the new Constitution.

The resolution of Local 47 was self-executing, and upon the passage of the new Constitution by the Union membership at large, Local 47 thereupon became disaffiliated. (J.A. 162a)

B. The Events Since 1970

The new Constitution, which is the subject of this lawsuit, has been in existence since October 1970. The Union has operated under that document for over five years, during which time the Union has undergone a thorough and complete restructuring.

Prior to 1970, the Union was composed of semi-autonomous locals. The new Constitution revamped this structure completely, providing instead for a divisional structure, with the former locals and their individual membership rolls being eliminated. The new divisions as provided for in the Constitution are the Offshore Division, the Inland Division, the Pilots Division, the Government Employees' Division and the Shoreside Division. (Pltffs' Exh. 1, Pltffs' Exh. 2)

Captain Gaier testified to the many changes that have occurred during the five years since the date when the new Constitution became effective.

All of the former Offshore Locals, some nine in number, have been merged into the single Offshore Division. (Pltffs' Exh. 15) The local structure in the Offshore Division has disappeared, with Offshore members now all belonging to the single Offshore Division. (J.A. 56a, 57a)

As part of the elimination of the locals, the members of Local 90 voted to liquidate their assets. Some one and a half million dollars were refunded to the former members of Local 90. (J.A. 58a), and the buildings in Local 90 are now held in trust where they are to remain for the next forty years. The former membership of Local 20, in Galveston and Houston, voted to turn over their assets to the International, as did the members of Local 15. (J.A. 58a)

Further, the newly structured Offshore Division has closed the offices which had been in the Port of Wilmington, North Carolina and in the Port of Savannah, Georgia. (J.A. 55a) There has also been a downgrading and an elimination of positions in the Offshore Division. One job was eliminated in the Port of New York, and one was downgraded. (J.A. 55a) In the ports of Providence, Philadelphia, Baltimore, and New Orleans, there was a downgrading of one position each. (J.A. 55a)

Similar basic structural changes took place within two other divisions of the Union over this five year period. The former Inland locals, by two separate referendum votes, have consolidated into two regions; the West Coast Region and the East Coast Region of the Inland Division. (J.A. 52a, 53a) This resulted in the elimination of the separate Inland locals as was the case with the Offshore locals. The Pilots locals also conducted a referendum, voting to adopt a set of by-laws and forming the new Pilots Division, composed of all of the former pilot locals with the exception of two in the Panama Canal. (J.A. 53a) These former old pilot locals have also disappeared. (J.A. 57a)

With this restructuring has also come a change in the method by which the current Divisional officers have been elected. As provided in the new Constitution and Offshore

Division By-laws, there are no longer any local membership lists. All Offshore Division members now belong to the single subordinate body of the International, the Offshore Division. (Pltffs' Exh. 15) All of the current Offshore Division officers, who were elected to serve for the three year term 1975 through 1977, inclusive, were elected by the entire Offshore Division Membership rather than as previously, by the individual Local port membership. (Pltffs' Exh. 15)

Aside from the membership referenda creating the several divisions and adopting the respective Divisions' By-Laws, there have been three separate referenda since October 1970 held among the entire membership of the union by which amendments to the 1970 Constitution have been adopted. (J.A. 49a, 50a, Deft's Exhs. H,I,J) One such amendment in 1971 brought about an affiliation of the International Organization of Masters, Mates and Pilots with the International Longshoremen's Association. (Deft's Exh. H)

Another significant amendment to the new Constitution, affecting the basis by which the Union's highest governing body, the General Executive Board, casts its votes, became effective in January 1975. (Deft's Exh. J)

By this amendment, one major complaint of the plaintiffs that the three International officers exercised dictatorial control over the Union by reason of their ability to cast weighted

votes in the General Executive Board, was eliminated. The new voting structure allows only one vote per person to each member of the General Executive Board. This amendment to the Constitution reads as follows:

"In Article VII, Section 1, delete both paragraphs of (a) and substitute the following:

'(a) Each member of the General Executive Board shall have one vote and a majority of the votes cast at any meeting of the General Executive Board shall be necessary to adopt any resolution.'

'(b) A majority of the General Executive Board members shall constitute a quorum.'"

(Deft's Exh. J)

The other primary complaint of the plaintiffs, the increase in dues for all Offshore Division members to \$300 per annum, has also been rendered moot. In January, 1974, the Offshore Division membership by referendum voted an additional increase in dues beyond the \$300 per year, in the amount of 6% of earned vacation benefits. (J.A. 51a, Deft's Exh. K)

In short, the five year period during which the union had conducted its business under the new Constitution, and under the several subsequent amendments to that new Constitution and under the new Divisional structure, has seen a complete and fundamental change in the conduct of Union business, and a disappearance over this five years of the traces of the former local set-up. (J.A. 56a, 57a)

POINT I. THE VIEWS OF THE OPPONENTS TO THE NEW CONSTITUTION WERE DISSEMINATED SUFFICIENTLY SO AS TO SATISFY THE REQUIREMENTS OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT, AS DESCRIBED BY THE PRIOR MANDATE OF THIS COURT

The essential reason underlying this Court's prior reversal of Judge Knapp's judgment in favor of the defendant can be seen in the comments appearing in footnote 9 of the Court's original decision of May 28, 1974. The Court, in that footnote, made the following observation:

"...In this case, however, the defendant union officials' stiff-necked refusal even to provide their opponents access to the membership mailing list rendered the referendum procedure so patently unfair that their conduct can fairly be deemed 'a denial of the [members'] equal right to vote in elections or referendums' Gurton v. Arons, supra., 339 F.2d at 374." Sheldon v. O'Callaghan, 497 F.2d at p. 1283.

Implicit in this statement was the Court's apparent belief that by denying access to the mailing list, all voices opposing the new Constitution had been effectively and completely cut off, and that no dissenting views were in any fashion being made known to the membership.

Upon the issuance of this Court's opinion, the defendant on June 3, 1973, filed a Petition for Rehearing and for Rehearing En Banc pointing out that the dismissal of the

action came at the end of plaintiffs' case and that the Union did not have an opportunity to put in a defense, specifically, with respect to the wide distribution of plaintiffs' local Union newspaper among the union membership and that the views of the plaintiffs were in fact being disseminated.

Although the Petitions for Rehearing and for Rehearing En Banc were denied, the Court, sua sponte on June 14, 1975 issued an amendment to its prior Opinion stating, in part, as follows:

"Defendants state, however, that if their motion to dismiss had not been granted, they would have presented evidence that a newspaper published by the plaintiffs' local union was widely distributed among the union membership, and that plaintiffs' views were in fact being disseminated.

The Judgment must be reversed and the case remanded for further proceedings consistent with this opinion." 497 F.2d at p. 1283.

The Court, in its remand, was thus declaring that access to a mailing list in a union referendum which was not involved with an election of officers was not an absolute statutory right of the membership.* Rather, the Court was saying that

*In view of the language of the amendment, it is not necessary in this brief to deal with the issue of whether or not, in the abstract, a union member has the right, under the LMRDA to access to a membership list in a union referendum which is not involved with an election of officers. It is the defendant's position that no such right exists, and a detailed review of

(cont.)

the absence of access to a mailing list did not automatically render a referendum invalid, but that compliance with the LMRDA as respects voting in a referendum which is not involved with an election could be found in something considerably less--if there was, in fact, a dissemination of views opposing the matter at issue, and, here, that the Local 88 newspaper was given "wide distribution."**

Following presentation of the defendant's case at the resumption of the trial on July 2, 1975, Judge Knapp, from the bench, ruled that the specifications set forth by the Court of Appeals had been met by the defendant Union, and he dismissed the case.

After rendering his decision dismissing the case, Judge Knapp asked counsel for the plaintiffs to advise him whether or not the plaintiffs planned to appeal from such ruling so that the parties, in such event, could submit to Judge Knapp their views on what the relief should be in the event such appeal was taken and the Court of Appeals reversed. (J.A. 116a, 117a)

*(cont.) of the statute and its legislative history in support of this position appears in the Petition for Rehearing and for Rehearing En Banc filed on June 7, 1973 in connection with the prior appeal in this case.

** Section 101(a)(1) of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. §411(a)(1) provides:

"Equal Rights -- Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor

(cont.)

Counsel for the plaintiffs did in fact advise Judge Knapp that the plaintiffs intended to appeal, and it was after such advice that on July 28, 1975, Judge Knapp reversed his decision and gave judgment to the plaintiffs.

It is submitted that Judge Knapp's original decision was correct, and that the burden and specifications set forth by the Court of Appeals were in fact met, i.e., that the Local 88 newspaper was widely distributed and that the views opposing the new referendum were in fact being disseminated to the membership. And, as Judge Knapp initially found, there was, therefore, compliance with the requirements of the Labor-Management Reporting and Disclosure Act and this Court's mandate, and that the new Constitution had in fact been properly ratified and passed.

The Local 88 Newspaper

Judge Knapp made a finding of fact at the July 2 hearing that Captain Gaier's testimony was true, and that the Local 88 newspaper was distributed as he testified. (J.A. 110a)

Even on July 28, 1975, when Judge Knapp reversed his prior decision, he reaffirmed his finding that the testimony of

**(cont.) organization, to attend membership meetings and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws. "

Captain Gaier was credible. (J.A. 128a)

Captain Gaier's testimony clearly showed that the Local 88 newspaper received the wide distribution that this Court's mandate spoke of. This distribution, set forth previously in this brief, may be summarized as follows:

- . 14,000 copies printed, far in excess of the 9,500 to 8,800 total membership of the union.
- . Direct mailing to home addresses of some 2,300 members of Local 88
- . Direct mailings to home addresses of all union members, not limited to Local 88 membership, who had snipped or cleared through the Port of New York
- . Direct mailing of the newspaper to each vessel under contract with the Union, with the number of copies sent to each ship reflecting the number of union members serving aboard the vessel.
- . Bulk mailings to each of the union's locals.
- . Bulk mailings to United Seamen's Service Clubs throughout the world.

An examination of the Local 88 newspaper (Deft's Exh. E, J.A. 150a-158a) leaves no doubt that it contained the views

of the plaintiffs in substantial detail in opposition to the new Constitution. The distribution among the membership, as testified to credibly by Captain Gaier, was in fact wide.

It is respectfully submitted that on the basis of the Local 88 newspaper alone, the mandate of the Court of Appeals and the burden of the defendant had been met, and the decision of Judge Knapp awarding judgment in favor of the plaintiffs, should be reversed.

The Local 90 Newspaper and
The Local 47 Resolution of
Disaffiliation

At the July 2 trial, the defendant union presented further evidence, beyond the publication and distribution of the Local 88 newspaper, reflecting additional dissemination to the membership of views in opposition to the proposed new Constitution. Although this additional material was admitted into evidence, Judge Knapp ruled that it did not satisfy the Court of Appeals mandate with respect to the dissemination of opposing views. It is respectfully urged that Judge Knapp was in error on this, and the Local 90 newspaper testimony and evidence and the Local 47 Resolution of Disaffiliation constitutes further probative evidence on the dissemination of opposition views, all in support and in satisfaction of the requirements of the LMRDA, as enunciated by this Court.

The Local 90 membership was some 2,000 in number. There were 3,000 copies printed of each issue published prior to and during the course of the referendum on the new Constitution. The testimony of Captain Tuttle on the publication and distribution of the Local 90 newspaper, was uncontradicted.

Captain Tuttle's testimony, previously set forth in the Statement of Relevant Facts, was that the newspaper was mailed to the current addresses of all active members of Local 90, that copies were mailed to all Offshore, Pilot and Inland locals, that copies were mailed to each vessel under contract to Local 90, that copies were sent to United Seamen's Service Clubs overseas, that copies were placed on the tables in the various union halls on the West Coast, and that the Local 90 patrolmen distributed the newspapers to the officers on each of the vessels which paid off on the West Coast, which distribution was to union members from all over the country and not limited to Local 90 people.

Captain Sheldon's opposition verbatim letter, although not over his signature, was published in the February-March issue of The Sextant. The membership comments, which are articulate and strongly antagonistic to the new Constitution (J.A. 167a-176a), set forth a broad spectrum of complaints about the proposed new Constitution. The comments also were far from shy in tone:

"Now get this, Brothers, and hang on to your hats. The International President, International Vice-President and International Secretary-Treasurer will whack up the offshore per capita vote with the three Offshore Vice Presidents. A combination of any four of these individuals will pack enough voting power to control the union and none of them will be directly accountable to the membership for their actions.

. . .

When you realize the International President is to be named editor of the International rag and will be given a free hand in its use, you should get the picture. The provisions to fill vacancies of International Officers by General Executive Board action, instead of by membership referendum, will be further denial of the right of the membership to choose its leaders in a democratic fashion." (Deft's Exh. P, J.A. 175a)

"These Constitutional shenanigans call for an Offshore dues increase to \$300 per annum.

"The wage increase planned for certain officials, high salaried presidential appointees, whose main job will be to tighten the screws on political control and other extravagant excess of top heavy bureaucracy will cost this membership a bundle if we are suckers enough to go for this proposition." (Deft's Exh. P, J.A. 175a)

During the course of argument with respect to the Local 90 newspaper, counsel for the plaintiffs argued that the opposition views set forth in the Local 90 newspaper, not being the specific views of the particular plaintiffs in this case,

could not act to satisfy the LMRDA's referendum requirements. We submit that this contention misinterprets the thrust of this Court's mandate.

Thus, for example, the plaintiffs in this case urged that the defendant union was obliged to give them space in the union newspaper for the presentation of their views. This Court in its prior Opinion held that there was no such right. (497 F.2d at page 1282) But let us assume *arguendo*, that the pre-1970 Constitution did grant access to the official publication to the membership for presentation of a point of view relating to matters submitted to referendum, as indeed, the new Constitution now does. (Pltffs' Exh. 2, p. 44)

Under those circumstances, if the union newspaper had selected not the letter sent in by a particular member, due to space limitations preventing the publication of all letters received, but instead printed a letter or letters containing substantively equivalent opinions on a referendum matter, it is obvious that this would comply with any fair referendum requirements under the LMRDA. Such a conclusion is signaled by the language of this Court in its prior decision wherein it stated:

"A fair referendum under the facts of this case included the right of the members whose views were opposed to defendants' to have an opportunity to present their views to other members of the Union."
497 F.2d at p. 1282."

Surely, this would not impose a requirement on the Union that every letter of every dissenting union member must be published in the paper. It would only mean, at most, that a fair sampling of opposition views be published. This is exactly the situation with respect to the publication of The Sextant, where views strongly in opposition to the new Constitution were in fact presented to the membership.

Given the fact that this was not an election involving one candidate against another, but, rather, an issue relating to the adoption of a Constitution, it is not the identification of any particular member or group of members that the LMRDA has concern with, but, rather, only the substantive views concerning the issue. And in this case, the substantive views against the adoption of the new Constitution were clearly contained in The Sextant.

The Local 47 Resolution of Disaffiliation, passed by the membership in convention on March 6, 1970 was also a clear example of active membership views against the new Constitution. (Deft's Exh. G, J.A. 162a-166a) Judge Knapp was in error in not considering this document, and the voice of the Local 47 membership, as further examples of satisfaction of the LMRDA requirement by reason of opposition views being disseminated to the membership.

It is submitted that the evidence of distribution of

the Local 88 newspaper, found credible by Judge Knapp, was sufficient to satisfy the LMRDA requirements in this referendum. When coupled with the further evidence relating to the Local 90 newspaper and the Local 47 disaffiliation resolution, it is clear that the membership was in fact well apprised of the views in opposition to the new Constitution, and that the referendum procedures were, in all respects, consonant with the requirements of the LMRDA.

POINT II. EVEN IF THE LMRDA REQUIREMENTS
SURROUNDING THE REFERENDUM WERE
NOT COMPLIED WITH, THE EVENTS
WHICH HAVE TAKEN PLACE SINCE
1970 CONSTITUTE A PROPER RATI-
FICATION OF THE NEW CONSTITUTION,
NUNC PRO TUNC

It is submitted, from the foregoing discussion, that the LMRDA requirements as described by this Court, surrounding the Union's referendum on the new Constitution were complied with, and that the judgment of the District Judge should be reversed and the action dismissed. However, even if it is found that the LMRDA requirements had not been complied with, it is submitted that the events which have taken place since 1970 constitute a proper ratification of the new Constitution nunc pro tunc and that such circumstances, therefore, also warrant a reversal of the judgment below and a dismissal of the action.

We have previously described in this Brief, from the evidence produced at the trial, the myriad ways in which the entire union structure has been changed over the past five years while the new Constitution has been in effect. The old local structure has vanished along with individual membership in a particular local and the election by a local of its own individual officers, which had been the keystone of the makeup of the union prior to 1970. All of the eggs over this five year span of time have been thoroughly scrambled.

Moreover, and most significantly, since the 1970 ratification of the new Constitution, there have been three separate subsequent amendments thereto through unchallenged referenda.

Aside from the very significant affiliation of the union with the International Longshoreman's Association, which became effective in 1971, the amendment of January 1975, which brought into being a one-man, one-vote ballot on the Union's General Executive Board, eliminated one of the chief complaints of the plaintiffs to the original new Constitution, that of an alleged improper, inordinate power in the hands of the three International officers by reason of their ability to cast weighted votes.

Similarly, the complaint about the dues increase of the Offshore Division to \$300 per man per year has also vanished.

In January 1974 the Offshore Division membership voted an additional increase in dues beyond the \$300 per year, in the amount of 6% of earned vacation benefits. (Deft's Exh. K, J.A. 51a)

Thus, the major objections which the opponents to the new Constitution had raised in 1970, and which they desired to make known to the union membership in that referendum have, in the fullness of time, been met by remedial subsequent amendments approved by membership referenda.

Moreover, since the 1970 referendum, there has been an almost complete change in the Union's hierarchy.

The three 1970 International officers, O'Callaghan, Crooks and Caldwell, named as the nominal defendants in this lawsuit are now all out of office. (Captain Crooks died in 1970). Frank Scavo, an opponent of the new Constitution and Secretary-Treasurer of Local 88 at the time of the referendum (J.A. 150a, 152a, 153a, 158a) is now International President.

If objectionable parts still remain in the new Constitution, as amended to date, there is provision within the Constitution for orderly amendment thereof (Pltffs' Exh. 2, Article X) which, in fact, has taken place three times since 1970.

With the total change in International officers, and with an almost complete change in all of the union's other elective offices since 1970, an entirely different union

hierarchy now exists. There are no incumbent union officials who carry the "stiff-necked" taint attributed by this Court to these 1970 International officers. Under the new Constitution, the membership now has the right to fair and reasonable access to the Union's newspaper for presentation of views regarding matters submitted to referendum. (Pltffs' Exh. 2, Article XI, Section 5)

It is submitted that these events, the passage of five years and, in particular the three amendments to the 1970 Constitution, all or individually, constitute a proper ratification of the new Constitution nunc pro tunc, and on that basis, the judgment of the District Court should be reversed, and the action dismissed.

CONCLUSION

For the reasons stated, it is respectfully urged that the judgment of the District Court be reversed, and that the action be dismissed.

Dated: New York, New York
November 5, 1975

Respectfully submitted,

MARVIN SCHWARTZ, P.C.
Attorney for Defendant-Appellant
243 Waverly Place
New York, New York 10014

BURTON M. EPSTEIN

Of Counsel

United States Court of Appeals

For the Second Circuit

Docket No. 75-7504

LLOYD SHELDON, VICTOR SOTO, JAMES CLIFFORD,
ARTHUR SOHNEN and JOHN HAYES, each of them individu-
ally and on behalf of all other members of INTERNATIONAL
ORGANIZATION OF MASTERS, MATES AND PILOTS,
AFL-CIO, similarly situated,

Plaintiffs-Appellees,

against

THOMAS F. O'CALLAGHAN, as President, or CHARLES M.
CROOKS, as Secretary-Treasurer, or WILLIAM M. CALD-
WELL, as Vice President, of INTERNATIONAL ORGANIZA-
TION OF MASTERS, MATES AND PILOTS, AFL-CIO,

Defendant-Appellant.

STATE OF NEW YORK }
CITY OF NEW YORK } ss.:
COUNTY OF NEW YORK }

KENNETH A. ROGAWICZ, being duly sworn, deposes and

says, that he is over 18 years of age. That on the *5TH* day of

NOVEMBER, 1975, he served *TWO COPIES* of

the attached *APPELLANT'S BRIEF* on

the attorney for the *PLAINTIFFS-APPELLEES*

